

**United States Department of Labor
Employees' Compensation Appeals Board**

J.B., Appellant)
and) Docket No. 12-1253
DEPARTMENT OF THE INTERIOR,) Issued: December 14, 2012
NATIONAL WILDLIFE REFUGE, Merced, CA,)
Employer)

)

Appearances:

Stephen Scavuzzo, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 23, 2012 appellant, through his attorney, filed a timely appeal from a November 30, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a five percent permanent impairment to his left leg.

FACTUAL HISTORY

On September 16, 2003 appellant, then a 38-year-old maintenance worker, filed a traumatic injury claim Form CA-1 alleging that he sustained a left leg injury when he stepped

¹ 5 U.S.C. § 8101 *et seq.*

into a hole and fell to the ground. OWCP accepted the claim for a left ankle sprain/strain. On March 1, 2004 appellant underwent a left talar osteochondral autograft transfer system (OATS) surgery performed by Dr. Mark Via, a Board-certified orthopedic surgeon. He returned to a full-time modified position in August 2004. In a report dated March 4, 2005, Dr. Via indicated that appellant was working without restrictions.

On January 28, 2010 appellant underwent arthroscopic left ankle surgery, with hardware removal. Dr. Via noted that appellant had reported left ankle pain over the past year. In a report dated May 28, 2010, he stated that appellant's condition may be considered permanent and stable. Dr. Via provided range of motion for the left ankle and diagnosed healed stable ankle, status post arthroscopic debridement, improving discomfort left ankle, status post hardware removal and chronic ankle stiffness and pain secondary to degenerative arthritis.

In a state workers' compensation form report dated January 4, 2011, Dr. Via provided results on examination, diagnosing left ankle osteochondritis dissecans and left ankle osteoarthritis. He opined that appellant had a five percent whole person impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Dr. Via stated that the impairment was based on mild motion loss and mild cartilage loss.

In a report dated March 31, 2011, OWCP's medical adviser reviewed the medical evidence. The medical adviser opined that under the sixth edition of the A.M.A., *Guides* appellant had a five percent left leg impairment "for residual problems status post surgical treatment of an osteochondral injury to the talus {[diagnosed condition] (CDX) 1C} (Table 16-2/Page 506)."

By decision dated April 25, 2011, OWCP issued a schedule award for a five percent left leg permanent impairment. The period of the award was 14.40 weeks from May 28, 2010.

Appellant requested a hearing before an OWCP hearing representative, which was held on August 29, 2011. By decision dated November 30, 2011, the hearing representative affirmed the April 25, 2011 schedule award decision.

LEGAL PRECEDENT

The schedule award provision of FECA² and its implementing regulations³ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants.⁴ The A.M.A., *Guides* has been adopted by the implementing regulations as the

² *Id.* at § 8107.

³ 20 C.F.R. § 10.404.

⁴ See *Ronald R. Kraynak*, 53 ECAB 130 (2001); *August M. Buffa*, 12 ECAB 324 (1961).

appropriate standard for evaluating schedule losses.⁵ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁶

With respect to a foot or ankle impairment, the A.M.A., *Guides* provides a regional grid at Table 16-2.⁷ The class of impairment CDX is determined based on specific diagnosis, and then the default value for the identified CDX is determined. The default value (grade C) may be adjusted by using grade modifiers for Functional History (GMFH, Table 16-6), Physical Examination (GMPE, Table 16-7) and Clinical Studies (GMCS, Table 16-8). The adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁸

ANALYSIS

In the present case, appellant submitted a January 4, 2011 report from Dr. Via with an opinion that appellant had a five percent whole person impairment under the fifth edition of the A.M.A., *Guides*. This opinion is of little probative value with respect to establishing the degree of permanent impairment. As noted above, any schedule award after May 1, 2009 must be based on the sixth edition. In addition, FECA does not provide for a permanent impairment to the whole person.⁹

OWCP's medical adviser opines that appellant had a five percent left leg impairment under the sixth edition, citing Table 16-2. The medical adviser's brief statement does not constitute a rationalized medical opinion. The medical adviser identified page 506, which has a default impairment of five percent for ankle arthritis, three millimeter cartilage interval and also a five percent default impairment for subtalar arthritis, two millimeter cartilage interval. The Board also notes that Table 16-2 at page 503 provides a five percent default impairment for talus, "nondisplaced with minimal findings." The medical adviser's statement as to "residuals problems status post surgical treatment of an osteochondral injury to the talus" does not clearly explain the specific diagnostic criteria used under Table 16-2. In addition, it is well established that a proper application of Table 16-2 requires the evaluator to use the adjustment grids and grade modifiers noted above to determine if adjustment from the default value is warranted.¹⁰ Table 16-6 through Table 16-8 provide grade modifiers for GMFH, GMPE and GMCS, and the adjustment formula is then applied. The medical adviser did not explain how the adjustment tables were applied to determine the final severity grade of the impairment.

⁵ *Supra* note 3.

⁶ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁷ A.M.A., *Guides* 501-08.

⁸ The net adjustment is up to +2 (grade E) or -2 (grade A).

⁹ The Board notes that FECA does not provide for permanent impairment to the whole person. *Janae J. Triplett*, 54 ECAB 792 (2003).

¹⁰ See, e.g., *V.H.*, Docket No. 11-2127 (issued June 8, 2012).

The case will accordingly be remanded to OWCP for clarification of the opinion as to a permanent impairment to the left leg. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds the case must be remanded to OWCP for further development of the evidence.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 30, 2011 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: December 14, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board